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## THE COURT'S CHARGE IN A LAND SUIT†

by

Clayton L. Orn\*

IN THE Declaration of Independence made by the delegates of the people of Texas at Washington on the Brazos, it was stated as one of the grievances of the people against the Mexican Government necessitating the dissolution of their ties that it "has failed and refused to secure, on a firm basis, the right of trial by jury, that palladium of civil liberty, and only safe guarantee for the life, liberty, and property of the citizens."<sup>1</sup> The right to a jury trial thus advanced at Washington on the Brazos was secured at San Jacinto, and all the constitutions of the Republic and State of Texas have preserved that right and in the same language—"the right of trial by jury shall remain inviolate."<sup>2</sup>

From the time of the inclusion of this language in the first constitution down to the present, the procedural problems incident to a jury trial, whether it be a land suit, a damage suit, or a will contest, have been of great importance to the legal profession and the judiciary. Among the procedural problems in a jury trial is the charge. Its importance is such that it has been the subject of many books, of much discussion, a prolific source of reversals, the cause of much perplexity, and the subject of change by statute and rule.

Civil cases in the district and county courts are submitted to a jury on either a general charge or on special issues.<sup>3</sup> In the earlier days of Texas jurisprudence there were statutes which permitted the submission of special issues, but the general charge was ordinarily used. It was not until the Act of 1913 that the method of submitting cases on special issues came into general use.<sup>4</sup> That act not only authorized the court in its discretion to submit causes on special issues, but also departed from previous statutes by making it mandatory when requested by either party to the suit.<sup>5</sup> Under the present Rules of Civil Procedure<sup>6</sup> district and county courts may submit a civil cause to the jury on a general charge if the parties agree or if neither party requests a submission upon special issues; or the

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<sup>1</sup> 1 Gammel's Laws of Texas 1065 (1898).

<sup>2</sup> *Cockrill v. Cox*, 65 Tex. 669, 672 (1886).

<sup>3</sup> Tex. R. Civ. P. 277. These will hereinafter be cited by Rule number only.

<sup>4</sup> *Speer*, Special Issues in Texas xi (1931).

<sup>5</sup> *Id.* at 14.

<sup>6</sup> Rule 277.

court may, for good cause, submit a case on a general charge even when one or all parties have otherwise requested. Whether good cause exists for not submitting the case on special issues is subject to review by the appellate courts. If the case could be submitted on special issues, no good cause would exist for not doing so. No case has been found where the court refused to submit a case on special issues after proper request had been made.

The principal object of the special issue submission is to have the jury find the facts and the trial court render such judgment as the law demands.<sup>7</sup> This prevents the jury from first determining which party should have judgment and then framing its verdict to accomplish that end. The principal distinction between submitting a case on a general charge and on special issues is that on a general charge the jury determines the facts and applies to the facts the law as given by the court, whereas on special issues the jury determines the facts and the court applies the law to the facts as found.<sup>8</sup>

## I. THE RULES OF CIVIL PROCEDURE

In 1939 the Legislature repealed, effective as of September 1, 1941, all laws governing the practice and procedure in civil actions and relinquished to the Supreme Court full rule-making power, subject to legislative veto.<sup>9</sup> The submission of a case to a jury, whether it be a land suit, a tort action, or a divorce action, is now governed by Rules 271 to 279, inclusive.

The question immediately arises whether there is any difference between submitting a land suit and any other civil action. There is only one difference. In the ordinary civil action the defendant is not entitled to an affirmative submission of any issue in his behalf if such issue is raised only by a general denial and not by an affirmative written pleading.<sup>10</sup> In a trespass to try title suit the rule is different, the reason being that in a trespass to try title suit the defendant may file only a plea of not guilty and prove under the plea any lawful defense to the statutory action except the defense of limitations which must be specially pleaded.<sup>11</sup> Consequently, in a trespass to try title suit, in submitting the defendant's defenses there are no defensive pleadings which the court can follow in determining the de-

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<sup>7</sup> *Amarillo v. Huddleston*, 133 Tex. 226, 152 S.W.2d 1088 (1941).

<sup>8</sup> *Colorado & S. Ry. Co. v. Rowe*, 238 S.W. 908 (Tex. Comm. App. 1922).

<sup>9</sup> Tex. Rev. Civ. Stat. Ann. art. 1731a (1945). Statutes will hereinafter be referred to by article number only.

<sup>10</sup> Rule 279.

<sup>11</sup> Rules 788-89.

fensive issues to be submitted. The issues to be submitted must be ascertained from the evidence.

#### A. *Controlling Issues*

Only the controlling issues made by the written pleadings and the evidence are to be submitted in a land suit. When they have been fairly submitted the case will not be reversed because of the failure of the court to submit other and various phases or different shades of the same issue.<sup>12</sup> The rules of civil procedure do not define what are controlling issues. The late Chief Justice Alexander said that the term was practically incapable of definition and was used because of the lack of a better one.<sup>13</sup> A controlling issue is different from an evidentiary issue, but the distinction between a controlling issue and an evidentiary issue is so imperceptible and so few opinions have been written in land suits making a distinction that the land lawyer must look to the opinions of the courts in other types of actions, particularly tort actions, where the trail has been blazed by the damage suit lawyer.

An approach to the question may be made by comparing a controlling issue with an independent ground of recovery or of defense. Rule 279 provides that where an independent ground of recovery or defense consists of more than one issue, but some of the issues are submitted to the jury and others are omitted, the court may make findings on the omitted issue in support of the judgment. It may be said then that a controlling issue consists of one or more material propositions of fact, which, to follow the language in the *Pepper* case<sup>14</sup> "constitutes a component element of a ground of recovery or of defense."

It has been said<sup>15</sup> that the object, purpose, and meaning of the rule with reference to a controlling issue could be more easily illustrated than defined. To illustrate the rule as applied to a land suit, assume that plaintiff has the record title to a section of land, and that defendant affirmatively pleads as an independent ground of defense the five-year statute of limitations. The material issues of fact on the defensive plea are (1) peaceable possession, (2) adverse possession, (3) cultivation, use or enjoyment, (4) payment of taxes, (5) claim under a deed duly registered, and (6) continuance of these acts for five consecutive years. The controlling issue to be submitted to the jury is whether the defendant has held peaceable and adverse

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<sup>12</sup> Rule 279.

<sup>13</sup> Shafer, Gammel's Annotated Rules of Civil Procedure 1-18 (1948).

<sup>14</sup> *Wichita Falls & S. Ry. Co. v. Pepper*, 134 Tex. 360, 135 S.W.2d 79 (1940).

<sup>15</sup> Shafer, *op. cit.* supra note 13, at li.

possession of the land, cultivating, using or enjoying the same and paying taxes thereon, and claiming under a deed duly registered for any period of five consecutive years. While it is true that the controlling issue consists of six evidentiary issues, nevertheless only the controlling issue should be submitted.<sup>16</sup> If any of the evidentiary issues should be omitted without objection in submitting the controlling issue, under Rule 279 the court may make written findings on the omitted issue in support of the judgment.

Safe advice to both counsel and the judiciary is contained in the following statement made by Judge Alexander:

Ordinarily, if the trial judge will examine his case carefully before beginning the preparation of his charge, he will be able to reduce the case to a very few controlling issues. Under the above rule, when he fairly submits the controlling issues, the case will not be reversed because of his failure to "pulverize" the issues.<sup>17</sup>

Each controlling issue need be submitted only once, but it must be submitted fairly, simply, and succinctly. No party is entitled to have the identical controlling issue submitted to the jury in two or more different forms.<sup>18</sup>

Rule 279 provides that when the court has fairly submitted the controlling issue, the case will not be reversed because of failure to submit other and various phases or different shades of the same issue. There is no guide for determining when a special issue ceases to be a different shade of an issue already submitted and becomes another controlling issue. In *LeBeau v. Highway Insurance Underwriters*,<sup>19</sup> a workman's compensation case, the Court held that an issue inquiring whether the employee's death was not the result of natural causes was merely a different shade of another issue inquiring whether the employee's death was caused by an accident.

#### B. Explanatory Instructions and Definitions

Rule 277 provides that the charge must include such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury properly to pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. Article 2189, from which the rule was taken, directed the inclusion of necessary "explanations and definitions of legal terms." Rule 277 is a radical departure from

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<sup>16</sup> *Whitten v. Dethloff*, 214 S.W.2d 480 (Tex. Civ. App. 1948).

<sup>17</sup> *Shafer*, op. cit. supra note 15.

<sup>18</sup> *Schumacher v. Holcomb*, 142 Tex. 332, 177 S.W.2d 951 (1944); *Northeast Tex. Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W.2d 487 (1942).

<sup>19</sup> 143 Tex. 589, 187 S.W.2d 73 (1945).

article 2189 insofar as it authorizes the court to submit explanatory instructions. Judge Alexander, in speaking of this departure, said:

Heretofore the court has been limited under the present statute in its submission of the case to the jury on special issues, to the submission of questions and the definitions of legal terms. It was held to be improper for the court ever to attempt to apply the law to the facts. The judge had to confine himself to mere definitions and explanations of legal terms. . . . Under the amendment above quoted, it will not be reversible error for the court to instruct the jury on any phase of the law, where such instructions are otherwise correct and are necessary to enable the jury to answer properly the issues submitted to them.<sup>20</sup>

The changes brought about by Rule 277 are quite apparent when the cases of *Guthrie v. Texas Pacific Coal & Oil Company*,<sup>21</sup> decided under article 2189, and *Pearson v. Doherty*,<sup>22</sup> decided under Rule 277, are compared. In the *Guthrie* case, the following issue was submitted:

Do you find from a preponderance of the evidence in this case, that the property involved in this suit was the business homestead of the defendant W. B. Guthrie, on July 1, 1929?<sup>23</sup>

In connection with this issue the court charged the jury as follows:

To aid you in answering the above and foregoing special issue, you are instructed that, if at the time mentioned, the defendant W. B. Guthrie, was using said property as a place to exercise the calling or business of the head of the family, then the same would be a business homestead, as that term is used in this charge.

If the renting of said property by the defendant to a tenant or tenants shown in the testimony was temporary in its character, that is, if it was the intention of defendant, at all times to rent the same for a while, but thereafter, again to occupy and use the same for the purposes of a business homestead, then such temporary renting would not destroy the character of the property as a business homestead.

On the other hand, if at the time said property was rented, or at any time after said property was rented, to a tenant or tenants by the defendant, he had the intentions never again to occupy or use the same for the purposes of a business homestead then such property would not be a business homestead, as that term is used in this charge.<sup>24</sup>

The Court condemned the instruction as a general charge.

In the *Pearson* case the Court suggested that in connection with

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<sup>20</sup> Shafer, op. cit. supra note 13, at xlix.

<sup>21</sup> 132 Tex. 180, 122 S.W.2d 1049 (1939).

<sup>22</sup> 143 Tex. 64, 183 S.W.2d 453 (1944).

<sup>23</sup> 132 Tex. 180, 182, 122 S.W.2d 1049, 1050-51 (1939).

<sup>24</sup> Id. at 183, 122 S.W.2d at 1051.

Special Issue No. 3 submitting the ten-year statute of limitation, the following instruction should be given:

. . . in order for Pearson and wife to have had peaceable and adverse possession of the land in question within the meaning of the law, they must have held possession of the land for the full ten-year period adversely and in hostility to the claim of Doherty, and unless the jury finds from a preponderance of the evidence that they have so held such land adversely and in hostility to the claim of Doherty, they will answer Issue No. 3 in the negative.<sup>25</sup>

While Rule 277 affords a greater latitude to the trial judge than did article 2189, and instructions are now permissible which formerly would have been condemned, the rule does not authorize the giving of an instruction which is not "necessary to enable the jury to properly pass upon and render a verdict on such issues" if such instruction will prejudice one of the parties before the jury.<sup>26</sup> In the *Boaz* case the court quoted with approval the following from an article by Judge J. D. Dooley: "This clause will permit explanatory instructions, even in the nature of general charges, whenever there is good need for same to properly aid the jury. In my opinion, however, this does not license an unlimited use of general charges in a special issue case."<sup>27</sup>

Under article 2189 it was, and under Rule 277 it is now, the duty of the trial court upon proper request to define terms that have such a distinct legal meaning that they must be understood by the jury before a verdict can be rendered upon the issues submitted.<sup>28</sup> However, Rule 279 provides that "failure to submit a definition . . . shall not be deemed a ground for reversal of the judgment unless a substantially correct definition . . . has been requested in writing and tendered by the party complaining of the judgment."<sup>29</sup>

Legal terms used in land suits which should be defined are voluminous but the following are some: "peaceable possession" and "adverse possession";<sup>30</sup> "community property" and "separate property";<sup>31</sup> "misrepresentation" and "fraud";<sup>32</sup> "in paying quantities" and

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<sup>25</sup> 143 Tex. 64, 71, 183 S.W.2d 453, 456 (1944).

<sup>26</sup> *Boaz v. White's Auto Stores*, 141 Tex. 366, 172 S.W.2d 481 (1943).

<sup>27</sup> *Id.* at 484.

<sup>28</sup> *Robertson & Mueller v. Holden*, 1 S.W.2d 570 (Tex. Comm. App. 1928); *Texas Pac. Coal & Oil Co. v. Stuard*, 7 S.W.2d 878 (Tex. Civ. App. 1928) error ref.

<sup>29</sup> *Yellow Cab & Baggage Co. v. Green*, 154 Tex. 330, 277 S.W.2d 92 (1955).

<sup>30</sup> *Shellhammer v. Caruthers*, 149 S.W.2d 124 (Tex. Civ. App. 1941).

<sup>31</sup> *Hutson v. Bassett*, 35 S.W.2d 231 (Tex. Civ. App. 1931).

<sup>32</sup> *Wortman v. Young*, 221 S.W. 660 (Tex. Civ. App. 1920), rev'd on other grounds, 235 S.W. 559 (Tex. Comm. App. 1921).

"due diligence";<sup>33</sup> "material inducement";<sup>34</sup> and "market value."<sup>35</sup> However, legal terms should be explained or defined only when they have a special technical meaning and are used in law or in a judicial proceeding differently from their ordinary use, or when it is necessary for the jury to understand their legal meaning in order to pass on the issues submitted.<sup>36</sup>

### C. *Controverted Questions*

Rule 272 provides that the court shall submit only controverted questions of fact. It should refuse to submit any issue unless the facts relevant to the issue are in dispute. "Admitted facts should not be submitted and thereby possibly confused with the other issues."<sup>37</sup>

There are many lawsuits which in one way or another involve the title to lands. There are suits to cancel deeds and other instruments for fraud or duress, to reform deeds, to construe deeds, to remove cloud, to quiet title, to locate boundaries, to probate and construe wills—but the most common of all is the statutory action of trespass to try title.

Many land suits involve no issues of fact, but only issues of law, and are frequently tried before the court without a jury. Generally, where a jury has been demanded either the plaintiff or the defendant is relying upon a limitation title.

## II. TITLE BY LIMITATION

In most civil actions the limitation statutes are only defensive weapons, but in a land suit they are a double-edged sword. Under the provisions of article 5513, when an action for the recovery of land is barred by any of the statutes the person having peaceable and adverse possession is deemed to have full title precluding all claims. Consequently, the plaintiff may defeat the defendant's record title by proving a title in him under one of the limitation statutes. The land lawyer, therefore, must know how the issues of limitation should be submitted to the jury.

### A. *Peaceable and Adverse Possession*

The adverse claimant to mature a title under the three-<sup>38</sup> five-<sup>39</sup>

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<sup>33</sup> Texas Pac. Coal & Oil Co. v. Stuard, 7 S.W.2d 878 (Tex. Civ. App. 1928) error ref.

<sup>34</sup> Porter v. Robinson, 93 S.W.2d 477 (Tex. Civ. App. 1936).

<sup>35</sup> Texas Pipe Line Co. v. Watkins, 26 S.W.2d 1103 (Tex. Civ. App. 1930).

<sup>36</sup> Texas & N.O. Ry. Co. v. Martin, 32 S.W.2d 363 (Tex. Civ. App. 1930) error ref.

<sup>37</sup> Lamar v. Panhandle & S.F. Ry. Co., 248 S.W. 34 (Tex. Comm. App. 1923).

<sup>38</sup> Art. 5507.

<sup>39</sup> Art. 5509.



ten-<sup>40</sup> and twenty-five-<sup>41</sup> year statutes of limitation must have had "peaceable and adverse possession" of the land for the statutory period. "Peaceable possession" is defined in article 5514 as being such possession as is continuous and not interrupted by adverse suit to recover the estate. "Adverse possession" is defined in article 5515 as being such possession as is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Unless the evidence shows that the adverse claimant has been in peaceable and adverse possession of the land, no issue under the three-, five-, or ten-year statutes should be submitted. Actual possession of a part of the land is absolutely necessary.<sup>42</sup> The possession may be by an actual residence on the land, by such cultivation, use or enjoyment, or by visible, notorious acts of ownership as would give notice to the owner of the adverse claim.<sup>43</sup> It may be by the adverse claimant or by a tenant.<sup>44</sup> In determining whether an issue should be submitted under one of the statutes of limitation it is necessary to understand what constitutes peaceable and adverse possession. Possession standing alone is not sufficient to mature a title under the five- and ten-year statutes. There must also be cultivation, use or enjoyment of the land. It must be used for some purpose for which it is adapted.<sup>45</sup>

As a general rule, the land need not be separately inclosed if the adverse claimant is in possession under a deed or other written evidence of title, unless the land is used for grazing or unless the claimant is relying upon the ten-year statute, and the land is surrounded by other lands owned or claimed by him or adjoins 5,000 acres or more of land owned or claimed by him. An adverse claimant in possession of land under a deed, cultivating, using or enjoying the same, is in constructive possession of all of the land comprehended within the boundaries of his deed, though not in actual possession of the entire tract,<sup>46</sup> except where the possession is limited by the rule laid down in *Turner v. Moore*.<sup>47</sup>

Pasturing of stock is a use of land which will mature in the adverse claimant a limitation title, but the lands must be inclosed by

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<sup>40</sup> Art. 5510.

<sup>41</sup> Art. 5519.

<sup>42</sup> *McDow v. Rabb*, 56 Tex. 154 (1882).

<sup>43</sup> *Carlock v. Willard*, 149 S.W. 363 (Tex. Civ. App. 1912) error ref.

<sup>44</sup> *Dawson v. Ward*, 71 Tex. 72, 9 S.W. 106 (1888).

<sup>45</sup> *Nona Mills Co. v. Wright*, 101 Tex. 14, 102 S.W. 1118 (1907).

<sup>46</sup> *Caver v. Liverman*, 143 Tex. 359, 185 S.W.2d 786 (Tex. Civ. App. 1938) error dism., judg. cor.

<sup>47</sup> 81 Tex. 206, 16 S.W. 929 (1891).

fences, or fences and natural barriers, and the fences must be maintained.<sup>48</sup> The possession must also be hostile to the claim of the true owner.<sup>49</sup> Recognition of the title of the owner prevents or arrests the running of the statute. If the record owner interposes as a defense under a plea of not guilty the recognition of his title by the adverse claimant during the limitation period, it has been held that he is entitled to have the issue of recognition submitted to the jury. In *Cuniff v. Bernard Corporation*<sup>50</sup> the court submitted the following issue on recognition:

"Do you find from a preponderance of the evidence that O. T. Cuniff at any time within the said period of ten years therein found by you admitted, acknowledged or recognized by his words, acts or deeds that R. S. Sterling, R. S. Sterling Investment Company or Sour Lake State Bank was the owner of the land referred to therein?"<sup>51</sup>

The jury found that the adverse claimant had recognized the title of the record owner during the ten-year period, although in response to the previous issue, it had found that the record owner had held peaceable and adverse possession of the land for this period. The district court entered a judgment against the adverse claimant. On appeal he contended that the issue concerning recognition of title was evidentiary and that the ultimate issue of whether he had held peaceable and adverse possession for a ten-year period was answered favorably to his contention, entitling him to a judgment. The contention was overruled. The court said:

Thus, recognition of the defendant's title was an ultimate and controlling issue which, when found to exist, completely destroyed the plaintiff's claim to title by limitation. Being an ultimate and controlling issue, it was proper for the court to submit it . . . .

Nor do we think that the special findings concerning recognition of title were in conflict with the general issues of adverse possession and limitation found in plaintiff's favor so as to require the trial court to enter a mistrial. The special findings were not necessarily inconsistent with the general findings. The plaintiff Cuniff may have had the intent to claim the land adversely, as he testified he did. But, no matter what his intent may have been, his recognition of the defendant's title, as a matter of law, destroyed the adverse character of it . . . .

But, even if the special findings be treated as contradictory of the general issues submitting the 10-year statute of limitation, still the special findings of recognition must be given controlling effect. In such

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<sup>48</sup> *Wallis v. Long*, 75 S.W.2d 138 (Tex. Civ. App. 1934) error ref.; *Patrucio v. Selkirk*, 160 S.W. 635 (Tex. Civ. App. 1913) error ref.

<sup>49</sup> *Ford v. McRae*, 128 Tex. 106, 96 S.W.2d 80 (1936).

<sup>50</sup> 92 S.W.2d 577 (Tex. Civ. App. 1936) error ref.

<sup>51</sup> *Id.* at 578.

case the general finding is treated as a mere legal conclusion, the effect of which is destroyed by the adverse finding of a controlling fact upon which such conclusion rests.<sup>52</sup>

The identical point under similar facts and findings arose again in *Bennett v. Carey*,<sup>53</sup> and the case was disposed of in the same way. The special issues submitted to the jury may be found in the opinion.

In each of these cases the court held that the issues were not conflicting and that the record owner was entitled to judgment. The cases were decided before Rule 279 was adopted, which provides that where the court has fairly submitted the controlling issues, the case will not be reversed because of the failure to submit other or various phases or different shades of the same issue.

The ultimate issue under the three-, five-, and ten-year statutes is whether the adverse claimant has been in peaceable and adverse possession. The term "adverse possession" is defined by statute as an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another. A finding that the claimant had been in possession under a claim of right inconsistent with and hostile to the claim of another was tantamount to a finding that the claimant had not during the period recognized the claim of the true owner. Consequently the issue of recognition should not have been submitted in the *Cuniff* and *Bennett* cases.

The opinions in the *Cuniff* and *Bennett* cases were criticized by the Supreme Court in *Pearson v. Doherty*.<sup>54</sup> Judge Critz said the jury findings were in conflict and that the decision of the Court of Civil Appeals holding they were not, was contrary to the other decisions of the Supreme Court.

In *Pearson v. Doherty* the trial court submitted an issue inquiring whether the adverse claimant had held peaceable, adverse, and continuous possession of the land, using or enjoying the same for a period of ten years. It also submitted another issue as to whether the adverse claimant was holding the land adversely and in hostility to the true owner. The jury found in favor of the adverse claimant on the first issue and against him on the second issue. The Supreme Court held that the findings were in conflict and that no judgment should have been entered on the verdict. It said that on another trial it would not be error for the court to submit the issues as they had been submitted on the first trial, but it should refuse to receive

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<sup>52</sup> Id. at 580.

<sup>53</sup> 99 S.W.2d 1105 (Tex. Civ. App. 1936) error dismissed.

<sup>54</sup> 143 Tex. 64, 183 S.W.2d 453 (1944).

the verdict if the answers were conflicting. It also said that the trial court might have avoided the necessity of submitting an issue as to whether the adverse claimant had been holding the land adversely and in hostility against the true owner by submitting the usual issue on limitation and by instructing the jury. The Court said that the proper instruction would be that in order for the adverse claimants to have had peaceable and adverse possession they must have held possession of the land for the full ten-year period, adversely and in hostility to the claim of the true owner, and further that unless it is found from a preponderance of the evidence that the adverse claimant had so held such land adversely and in hostility to the claims of the true owner, the answer to the issue should be in the negative.

It is submitted that no such instruction was necessary. The court had defined "adverse possession" in the statutory language, using the phrase "inconsistent with and hostile to the claim of another." If the jury, in response to the principal issue, had found that the adverse claimant had held peaceable and adverse possession for the statutory period, they necessarily would have also found, under the definition of adverse possession, that the claimant's possession was actual and visible and was commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Judge Critz recognized that the word "another" included the record owner. Such being the case, there was no need for further instruction to the jury. The confusion arose out of the use of the word "another." It probably would have been better to have used the name of the true owner. The issue which brought about the conflict in the jury's finding was not an ultimate issue, but was evidentiary and a different shade of meaning from the main issue and should not have been submitted.

The court in *Viduarri v. Bruni*,<sup>55</sup> instead of submitting a special issue on recognition, gave the following special instruction:

"In connection with Special Issue No. 1, you are instructed that if you believe from a preponderance of the evidence that at the times after 1901, when Bruni and those holding under him secured deeds from some of the heirs of Manuela Borrego de Viduarri and persons claiming under them, they were merely seeking to quiet their possession of said lands or protect themselves from adverse litigation with reference thereto, such purchases would not constitute recognition that the heirs of Manuela Viduarri from whom they had not acquired title, had valid interests in the lands in controversy.

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<sup>55</sup> 179 S.W.2d 818 (Tex. Civ. App. 1944) error ref. w.o.m.

"On the other hand, if by making such purchases Bruni and those holding under him were not merely seeking to quiet their possession or to avoid litigation with reference to said lands, but were buying what they conceded to be valid interests therein, then such purchases would constitute a recognition of valid interests in the other heirs of Manuela Viduarri from whom they had not acquired title.

"You are further instructed in this connection, that if Bruni and those holding under him after 1901, recognized valid interests in the lands in controversy to be in some of the heirs of Manuela Viduarri and those holding under them, Bruni's and plaintiff's possession would not be adverse to such defendants, heirs of Manuela Viduarri, from whom they had not acquired title and those holding under them so long as such recognition continued."<sup>56</sup>

The record owner excepted to the instructions, and requested the submission of a special issue on recognition. On appeal the instructions were approved and the requested issue denied. The case will be further noted.

Again, in *Cook v. Hutto*<sup>57</sup> the court held that the true owner was entitled to the submission of a special issue on recognition and that the general instructions did not deprive him of that right. Under the holding in *Pearson v. Doherty* it was not necessary to submit an issue on recognition, since the issue was encompassed in the definition of peaceable and adverse possession.

If possession were commenced in privity with, or in recognition of the owner's title, the statute would not begin to run until there had been a repudiation of the owner's title and the adverse claimant had brought home to the owner actual or constructive notice of such repudiation.<sup>58</sup> The burden is on the adverse claimant to prove repudiation and notice to the owner.

In *Brown v. Bickford*<sup>59</sup> the court submitted the usual issue on the ten-year statute, followed by the following explanatory charge on constructive notice:

"You are hereby instructed in connection with the Special Issue No. 1 (relating to the ten-year statute) that the possession of the defendant and cross-plaintiff Bickford could not be adverse until June 1, 1926 (the date of the foreclosure sale), nor thereafter until such notice of such adverse possession was given to the record owner of the land.

"By 'notice' is not necessarily meant actual notice of such adverse possession and claim, but such notice may be presumed by the jury to

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<sup>56</sup> Id. at 821.

<sup>57</sup> 151 S.W.2d 642 (Tex. Civ. App. 1941), rev'd on other grounds, 139 Tex. 571, 164 S.W.2d 513 (1942).

<sup>58</sup> *Mhoon v. Cain*, 77 Tex. 316, 14 S.W. 24 (1890); *Houk v. Kirby Petroleum Corp.*, 65 S.W.2d 496 (Tex. Comm. App. 1933).

<sup>59</sup> 237 S.W.2d 763 (Tex. Civ. App. 1951) error ref. n.r.e.

have been brought home to the record owner of the title if the jury find from a preponderance of the evidence that the adverse occupancy, if any, and claim of title, if any, on the part of the said Will Bickford was open, notorious, exclusive and unequivocal for such a length of time as to be inconsistent with the existence of title in such record owner, and of such notoriety as to constitute notice to the record owner and those under whom the record owner claims title of the adverse possession, if any, and claim of title, if any, of the said Will Bickford. The inference of notice is one of fact to be determined by the jury."<sup>60</sup>

On appeal the court said that the instruction seemed to be supported by a number of reported cases, but reversed and rendered the judgment because the evidence was insufficient to show either actual or constructive notice of the tenant's repudiation.

The same rule which applies with reference to repudiation by a tenant and notice to the landlord also applies with reference to cotenants.<sup>61</sup> In *Viduarri v. Bruni*<sup>62</sup> the court, in connection with submitting a special issue under the ten-year statute, gave the following instruction:

"In connection with Special Issue No. 1 you are instructed that A. M. Bruni by the purchase of an undivided interest of 38,000 acres of land more or less in the Borrego Grant from Trinidad Cuellar de Viduarri, et al, the surviving wife and children of Lauriano Viduarri, described in the deed dated August 3, 1885, became a cotenant or tenant in common of such of the other heirs of Manuela Borrego de Viduarri, whose interests he had not purchased, and his possession would be presumed to have been in the right of the common title and not adverse to his cotenants unless and until he repudiated the title of his cotenants to any interest in the particular tracts of land in controversy and held the same adversely to the title of said cotenants, if you find he did so, and until he gave notice of such repudiation and adverse claim, if any, to said cotenants. Cotenancy or tenancy in common means where two or more parties own undivided interests in the same tract or tracts of land.

"It was not necessary for the said A. M. Bruni and plaintiffs to give actual notice to said cotenants of such repudiation and adverse holding if any, but such notice may be presumed by the jury to have been brought home to the cotenants if the jury find from a preponderance of the evidence that the adverse occupancy, if any, and claim of title, if any, on the part of the said A. M. Bruni and plaintiffs was open, notorious, exclusive and unequivocal for such a length of time as to be inconsistent with the existence of title in such cotenants and of such

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<sup>60</sup> Id. at 766.

<sup>61</sup> *Bordages v. Stanolind Oil & Gas Co.*, 129 S.W.2d 786 (Tex. Civ. App. 1938) error dismissed., judg. cor.

<sup>62</sup> 179 S.W.2d 818 (Tex. Civ. App. 1944) error ref. w.o.m.

notoriety as to constitute notice to the defendants and those under whom they claim title; the inference of notice being one of fact to be determined by the jury."<sup>83</sup>

The true owner requested the submission of special issues on actual and constructive notice and objected to the instructions given on the ground they were on the weight of the evidence. The court held the request and objection were properly overruled and relied upon Rule 277 for its authority. It said:

Since the adoption of the rule above quoted from, it is not reversible error for a trial court to give an instruction in the nature of a general charge in a special issue case, provided such charge or instruction is '*necessary to enable the jury to properly pass upon and render a verdict*' upon the issues submitted to it.

It seems readily apparent that the submission of Special Issue No. 1 by itself would not have constituted a comprehensive submission of the question of limitation under the facts of this case . . . .

While the special issue submitted in the main followed the wording of the ten-year statute and may be said to embrace the controlling fact consideration upon this phase of the case, it is clear that something else was necessary to enable the jury to render an intelligent verdict or finding. The trial court sought to supply this obvious deficiency by the use of special instructions. Appellants contend that the trial court should have submitted additional special issues instead of using the special instructions . . . .

It is perhaps possible that the limitation features of this case could have been submitted to the jury by the use of a number of separate issues, and that had such a method of submission been selected, it would not have been necessary to also submit certain of the explanatory instructions which were actually given by the trial court. However, we do not understand the rule to mean that simply because a theory of recovery or defense may be submitted by means of numerous special issues without explanatory instructions, it follows therefore that explanatory instructions are to be classed as 'unnecessary' when given by a court in order to enable it to submit a theory to the jury upon a lesser number of special issues.

It seems that the expression 'necessary to enable the jury to properly pass upon and render a verdict upon such issues' employed by the rule allows the trial judge some choice of method with reference to the submission of a theory of recovery or defense. It is clear that 'the rule affords a greater latitude to the trial judge than did the Statute.'<sup>84</sup>

"Peaceable possession" and "adverse possession" are legal terms which, under Rule 277, should be defined in the charge when special issues involving three-, five-, ten-, or twenty-five-year statutes

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<sup>83</sup> Id. at 821.

<sup>84</sup> Id. at 822-23.

are submitted to the jury.<sup>65</sup> In most cases, definitions similar to those contained in articles 5514 and 5515 are sufficient.<sup>66</sup>

The following definitions embodying the language of the statutes have been approved by the appellate courts:

By peaceable possession is meant continuous possession, uninterrupted by any adverse suit to recover the estate . . . .

By adverse possession is meant actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.<sup>67</sup>

The phraseology may vary so long as the substance is not changed from the statutory provisions. It is preferable when defining "peaceable possession" to use the clause "by any adverse suit to recover the land" instead of "by any adverse suit to recover the estate." It also would be better when defining "adverse possession" to use the clause "hostile to the claim of defendant (or plaintiff) and those under whom he holds" instead of "hostile to the claim of another." Definitions containing these clauses will suffice.<sup>68</sup>

In *Houston Oil Company v. Stepney*<sup>69</sup> it was held that a definition of adverse possession embodying the phrase "claim of another" was not misleading or suggestive that the adverse claimant could be claiming adversely to someone other than the true owner, particularly in view of the special issue as to whether the adverse claimant had claimed the land adversely to the opposing party.

Again, it has been held<sup>70</sup> that it is reversible error to enlarge upon the statutory definition of "peaceable possession" by adding "and which may be acquired by such visible acts of ownership as will give notice to the owner; and such possession may also be shown by actual tenancy under the person so claiming." The definition is not in conformity with the statute and places on the adverse claimant a greater burden than is required by law.

It will be noted that in the statutory definitions of "peaceable possession" and "adverse possession" there are also used the terms "con-

<sup>65</sup> *Shellhammer v. Caruthers*, 149 S.W.2d 124 (Tex. Civ. App. 1941).

<sup>66</sup> See *Viduarri v. Bruni*, 179 S.W.2d 818 (Tex. Civ. App. 1944) error ref. w.o.m.; *Batson Oil Co. v. Jordan*, 104 S.W.2d 538 (Tex. Civ. App. 1937) error dism.; *Krause v. Young*, 6 S.W.2d 800 (Tex. Civ. App. 1928); *Southwestern Lumber Co. v. Allison*, 261 S.W. 1085 (Tex. Civ. App. 1924), rev'd on other grounds, 276 S.W. 418 (Tex. Comm. App. 1925); *Collins v. Megason*, 228 S.W. 583 (Tex. Civ. App. 1921); 2 Tex. Jur. Adverse Possession § 185 (1929).

<sup>67</sup> *Viduarri v. Bruni*, 179 S.W.2d 818, 822 (Tex. Civ. App. 1944) error ref. w.o.m.; see also *Broughton v. Humble Oil & Ref. Co.*, 105 S.W.2d 480 (Tex. Civ. App. 1937) error ref.

<sup>68</sup> *Halsey v. Humble Oil & Ref. Co.*, 66 S.W.2d 1082 (Tex. Civ. App. 1933) error dism.

<sup>69</sup> 187 S.W. 1078 (Tex. Civ. App. 1916) error ref.

<sup>70</sup> *Pinchback v. Hockless*, 138 Tex. 306, 158 S.W.2d 997 (1942).



tinuous possession," "actual and visible appropriation of the land," "commenced and continued," "claim of right," and "hostile." The legal significance of some of these terms may not be known to a jury. Their meaning to the layman may be quite different from their legal meaning. The question, therefore, arises as to whether they are legal terms which should be defined in the charge.

In *White v. Haynes*<sup>71</sup> the court held that had the jury been burdened with explanations of all of these terms, the definitions of "adverse possession" and "peaceable possession" would have been extended to such an extent that the jury would have been lost in the realm of distraction and that instead of the definitions being an aid to them in an understanding of the legal terms, they would have had the reverse effect.

The facts in a case may render imperative definitions of some of these terms. The word "continuous" has a dictionary meaning of "without break, cessation, or interruption; unbroken." The legal meaning is quite different. There may be a break in the possession and yet the possession will be continuous within the meaning of the statutes. Continuity of possession is not broken by a temporary vacancy if there is no intention to abandon the premises.<sup>72</sup> Possession is said to be continuous if the break is not unreasonable.<sup>73</sup> The running of the statute is not stopped even though the premises are left vacant for a short time between the removal of the tenant and the entry of his successor, if there is no intention to abandon the possession.<sup>74</sup> In *Whitehead v. Foley*<sup>75</sup> the Court said:

A short and temporary vacation of the premises is the ordinary and frequently the unavoidable incident of the change of tenants. If the attendant circumstances are such, that a reasonable and prudent man would not be induced to suppose the possession has been abandoned, it cannot be insisted that the running of the statute has been interrupted.<sup>76</sup>

If the facts in a case should show breaks in the possession of the adverse claimant, the court should charge the jury on the meaning of the word "continuous." The following definition should be sufficient:

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<sup>71</sup> 60 S.W.2d 275 (Tex. Civ. App. 1933) error dismissed.

<sup>72</sup> *Wickizer v. Williams*, 173 S.W. 288 (Tex. Civ. App. 1914), *aff'd* on rehearing, 173 S.W. 1162 (1915) error ref.; *Collier v. Coutts*, 45 S.W. 485 (Tex. Civ. App. 1898), *rev'd* on other grounds, 92 Tex. 234, 47 S.W. 525 (1898).

<sup>73</sup> 2 Tex. Jur. Adverse Possession § 81 (1929).

<sup>74</sup> *Whitehead v. Foley*, 28 Tex. 1 (1866); *Hufstedler v. Sides*, 165 S.W.2d 1006 (Tex. Civ. App. 1942) error ref.; 2 Tex. Jur. Adverse Possession § 82 (1929).

<sup>75</sup> 28 Tex. 1, 15 (1866).

<sup>76</sup> *Ibid.*

"Continuous possession" means such possession as has been continued without the land being permanently vacated, or temporarily vacated for a period of time long enough to induce a reasonably prudent person to believe that the possession had been abandoned.

The word "continuously" was defined in *Allison v. California Petroleum Corporation*<sup>77</sup> in connection with the submission of the five-year statute. The issue was whether the defendant had held peaceable and adverse possession of the land "*continuously* cultivating, using or enjoying the same" for any consecutive period of five years. "Continuously" was defined as follows: "'A temporary cessation in the cultivation, use or enjoyment of the land or part thereof, during the time intervening between the gathering of a crop and the preparation for or planting of a crop the following season would not constitute any failure to continuously cultivate, use or enjoy the land.'" <sup>78</sup> On appeal it was said that the definition was not to be recommended, but that the case would not be reversed because of the definition in view of the unnecessary employment of the term "continuously" in the special issues. The court reaffirmed the rule that a temporary cessation between the time of gathering crops and the preparation for and planting crops would not break the continuity of possession.

If the term "continuous possession" were not defined when the evidence showed a temporary break in possession, the jury might accept the dictionary definition and find against the adverse claimant, even though the claimant had in law been in possession for the statutory period.

Instead of defining the term, a special issue could be submitted to the jury involving the elements of continuous possession. The only disadvantage is that it might lead to conflicting answers to two issues. If such issue were submitted it should be conditioned upon a finding that the adverse claimant had held peaceable and adverse possession for the statutory period, and could be framed as follows:

Did the plaintiff vacate the land, if you believe he did vacate the land, during the period you have found in response to Special Issue No. 1 that he was in peaceable and adverse possession of the land, if you have so found, for a long enough time to induce a reasonably prudent person to believe that the possession had been abandoned?

The issue should then be followed by an instruction that the burden of proof is upon the plaintiff to prove the negative of the issue. A

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<sup>77</sup> 158 S.W.2d 597 (Tex. Civ. App. 1941) error ref. w.o.m.

<sup>78</sup> *Id.* at 601.

definition of "actual and visible appropriation of land" would seem to be unnecessary in the ordinary case.

The courts have in a number of cases defined the terms "under a claim of right" and "hostile." It is doubtful if the definitions were necessary. In *Allison v. California Petroleum Corporation*<sup>79</sup> these terms were defined as follows:

"By the term 'claim of right,' as used in the main charge of the court, is meant that entry upon and possession of the land in controversy by defendants, or by those under whom they hold, shall have been with the intent to claim the land as his or her own, as the case may have been . . . .

"The word 'hostile,' as used in the special issue herein, means a holding with intent to claim it as his own to the exclusion of all others."<sup>80</sup>

The definitions were not challenged. The word "hostile" is defined erroneously, because too great a burden is placed on the adverse claimant. He is not required to claim the land "to the exclusion of all others." He is only required to claim title as his own and to the exclusion of the record title owner; or, stated differently, to the exclusion of the opposing party and those under whom he claims title. To require the adverse claimant to claim the land to the exclusion of all others is the same as requiring him to claim the land adverse to the whole world, which he is not required to do. It is well settled in Texas that possession need not be adverse and hostile as to all the world, but only as the true owner.<sup>81</sup>

"Claim of right" has been held to mean "an intention to claim the land as his own."<sup>82</sup>

The word "hostile" has been defined as meaning "an occupancy of the premises under a holding by the possessor as owner, and therefore against all other claimants of the land."<sup>83</sup> If it should be necessary to define the term "hostile," a definition that it means a claim made with the intention of holding the land as his own should suffice.

Peaceable and adverse possession need not be continued by the same person, but where it is continued by different persons successively there must be a privity of estate between them.<sup>84</sup> If the adverse claimant seeks to tack the possessions of different persons for

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<sup>79</sup> Id. at 599.

<sup>80</sup> Ibid.

<sup>81</sup> *Smith v. Jones*, 103 Tex. 632, 132 S.W. 469 (1910); *Moran v. Wallace*, 171 S.W.2d 149 (Tex. Civ. App. 1943) error ref. w.o.m.; *Petty v. Griffin*, 241 S.W. 252 (Tex. Civ. App. 1922) error dismiss.; contra, *Johnson v. Martinez*, 18 S.W.2d 925 (Tex. Civ. App. 1929) error dismiss.

<sup>82</sup> *Petty v. Griffin*, 241 S.W. 252, 255 (Tex. Civ. App. 1922) error dismiss.

<sup>83</sup> *Chapman v. Dickerson*, 223 S.W. 318 (Tex. Civ. App. 1920).

<sup>84</sup> Art. 5516.

the purpose of completing the bar, he must show that privity of estate existed between them. The word "privity" means privity of possession—not privity of title—because the adverse claimant has no title until the bar falls.<sup>85</sup>

Where the adverse claimant seeks to tack the successive possessions of several persons, the issue has usually been submitted so as to inquire whether the adverse claimant and those under whom he claims has had peaceable and adverse possession. However, the Court of Civil Appeals in *Overton Refining Company v. Harmon*<sup>86</sup> held that such an issue was insufficient. In that case the ten-year statute was submitted inquiring whether the "plaintiffs and those under whom they claim" had held peaceable and adverse possession. The issue was followed by statutory definitions of "peaceable possession" and "adverse possession" and by the instruction that "Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them."<sup>87</sup>

It will be noted that the instruction is identical with the statute.<sup>88</sup> The court held that the trial court should have defined privity of estate and followed the definition with a special issue requested by the record owner as to whether one of the persons whose possession was sought to be tacked to the possession of another had claimed the land when he took possession.

To meet the opinion of the Court of Civil Appeals in the *Harmon* case, the issue might be submitted so as to inquire whether the defendant "and those in privity of estate with him" have held peaceable and adverse possession of the land. The issue should be accompanied by the following instruction:

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. Privity of estate means privity of possession, and privity of possession exists between successive occupants when the earlier occupants' possession and claim passed or was transferred to the latter occupant by agreement, gift, devise or inheritance.

If an issue involving the five-year statute were submitted, instead of using "by agreement, gift, devise or inheritance" it should be "by deed duly registered, devise or inheritance." Under the five-year

<sup>85</sup> *Hutto v. Cook*, 139 Tex. 571, 164 S.W.2d 513 (1942); *Free v. Owen*, 131 Tex. 281, 113 S.W.2d 1221 (1938).

<sup>86</sup> 81 S.W.2d 207 (Tex. Civ. App. 1935), rev'd on other grounds, 130 Tex. 365, 109 S.W.2d 457 (1937), aff'd on rehearing, 130 Tex. 365, 110 S.W.2d 555 (1937).

<sup>87</sup> *Id.* at 210.

<sup>88</sup> Art. 5516.

statute, the claimant in order to tack periods of possession, must show a concurrence of the statutory requirements as to possession and registration of deeds. That is, the deed under which each occupant held must have been duly registered.<sup>89</sup>

#### B. *The Three-Year Statute*

The adverse claimant in order to mature a title under the three-year statute<sup>90</sup> must have held "peaceable and adverse possession" under "title or color of title" for the statutory period. "Title" is defined in article 5508 as a "regular chain of transfers from or under the sovereignty of the soil." "Color of title" is defined in the same article as "a consecutive chain of such transfers down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession."

Whether the adverse claimant has a "title" or "a color of title" is ordinarily a question of law for the court, and not of fact for the jury; but whether he has been in peaceable and adverse possession for the statutory period is usually a question of fact. If the undisputed evidence would support a conclusion of law that the adverse claimant had a "title" or "a color of title" within the meaning of the statute but there remained a question of fact as to whether the claimant had been in peaceable and adverse possession for the statutory period, only the disputed issue of fact should be submitted to the jury. The following form would be sufficient:

Do you find from a preponderance of the evidence that the plaintiff [or defendant], either in person or through a tenant or tenants, or partly in person or partly through a tenant or tenants, has held peaceable and adverse possession of the lands in controversy for any period of three consecutive years prior to January 1, 1952 [date of filing of suit] and subsequent to January 1, 1910 [the date adverse possession commenced]?

It would not be necessary to include in the issue the clause referring to a tenant or tenants if the adverse claimant had actually occupied the premises.

If an issue of fact has arisen as to whether the adverse claimant

<sup>89</sup> *Daugherty v. Manning*, 221 S.W. 983 (Tex. Civ. App. 1920) error dismissed; 2 Tex. Jur. Adverse Possession § 92 (1929).

<sup>90</sup> Art. 5507.

has "title" or "a color of title," the issue must be resolved by the jury. This could be done in one of two ways: (1) the court could submit a special issue involving the disputed issue of fact followed by another issue inquiring whether the claimant had held peaceable and adverse possession for the statutory period; or (2) the court could define in the language of the statute "title" and "color of title" and follow such definitions by an issue as to whether the adverse claimant had held peaceable and adverse possession under "title" or "color of title" for the statutory period.

The latter procedure would be less desirable because it would leave to the jury a determination of whether plaintiff is holding under a regular chain of transfers from or under the sovereignty of the soil or a consecutive chain of transfers without the transfers being regular due to some instrument not having been registered or duly registered, or some like defect not extending to the want of intrinsic fairness and honesty. Every lawyer who has faced a jury composed of a barber, a farmer, a plumber, and a professional whittler can well visualize the utter consternation and bewilderment that would follow the reading of a charge defining in the language of the statute "title" and "color of title."

### C. *The Five-Year Statute*

The adverse claimant to mature a title under the five-year statute must have had peaceable and adverse possession of the land in controversy, cultivating, using or enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered for the statutory period.<sup>91</sup>

The terms "duly registered" and "paying taxes thereon" are legal terms which should be defined when the five-year statute is submitted. They were defined in *Allison v. California Petroleum Corporation*<sup>92</sup> as follows:

" 'Paying taxes thereon,' means paying from year to year as the taxes accrue and before they are delinquent, and includes all taxes assessed against the land . . . .

"The term 'duly registered' means that such deed or deeds must have been filed in the office of the county clerk of Gregg County, Texas."<sup>93</sup>

The special issue on the five-year statute is usually submitted in the following language:<sup>94</sup>

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<sup>91</sup> Art. 5509.

<sup>92</sup> 158 S.W.2d 597, 599 (Tex. Civ. App. 1941) error ref. w.o.m.

<sup>93</sup> Ibid.

<sup>94</sup> *Harris v. Wood County Cotton Oil Co.*, 222 S.W.2d 331 (Tex. Civ. App. 1949)

Do you find from a preponderance of the evidence that the plaintiff [or defendant] either in person or through a tenant or tenants, or partly in person or partly through a tenant or tenants, has held peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same, or any part thereof, and paying taxes thereon, and claiming under a deed or deeds duly registered for any period of five consecutive years prior to January 1, 1952 [date of filing suit]?

It is error to use in the issue the term "cultivating, using *and* enjoying." The statute is in the disjunctive, and *or* must be used.<sup>85</sup>

#### D. *The Ten-Year Statute*

To mature a title under the ten-year statute, the adverse claimant must affirmatively show (1) peaceable and adverse possession, and (2) cultivation, use or enjoyment. Unlike under the three- and five-year statutes, he need not show that he has a title or color of title or that he is claiming under a deed duly registered.<sup>86</sup> However, if he is claiming under a deed or some other written memorandum of title duly registered which fixes the boundaries of his claim, his possession will be coextensive with the boundaries specified in the instrument. If he is not in possession under a deed or some other written memorandum of title, then he is naked possessor and his possession is restricted to not more than 160 acres including his improvements, or to the number of acres actually inclosed, should he have inclosed more than 160 acres.<sup>87</sup>

In a majority of the cases which reach the courts today the adverse claimant is holding under a deed or some other written memorandum of title duly registered. His actual possession gives notice of his adverse claim, but the recorded deed or other recorded memorandum of title aids the possession as a means of notice and affords information as to the character and extent of his claim.<sup>88</sup>

The authorities are in harmony in holding that a written memorandum of title which is insufficient to constitute a deed must be duly registered, but there is a conflict as to whether a deed must be duly registered in order for the adverse claimant's possession to be coextensive with the boundaries described in the deed.<sup>89</sup> The cases

error ref. n.r.e.; *California Petroleum Corp. v. Allison*, 158 S.W.2d 597 (Tex. Civ. App. 1941) error ref. w.o.m.; *White v. Haynes*, 60 S.W.2d 275 (Tex. Civ. App. 1933) error dism.; *Collins v. Megason*, 228 S.W. 583 (Tex. Civ. App. 1921).

<sup>85</sup> *Hess v. Webb*, 113 S.W. 618 (Tex. Civ. App. 1908), aff'd 103 Tex. 46, 123 S.W. 111 (1909).

<sup>86</sup> *Hays v. Hinkle*, 193 S.W. 153 (Tex. Civ. App. 1917) error ref.

<sup>87</sup> *Schleiher v. Gatlin*, 85 Tex. 270, 275, 20 S.W. 120, 123 (1892).

<sup>88</sup> *McKee v. Stewart*, 139 Tex. 260, 162 S.W.2d 948 (1942).

<sup>89</sup> Holding that the deed need not be recorded, see *Hays v. Hinkle*, 193 S.W. 153 (Tex. Civ. App. 1917) error ref. *Contra Harvey v. Humphreys*, 178 S.W.2d 733 (Tex. Civ. App. 1944) error ref. w.o.m.; *Odum v. Leahy*, 264 S.W. 218 (Tex. Civ. App. 1924); *Donald v. Stanfield*, 197 S.W. 892 (Tex. Civ. App. 1917) error ref.

are consistent in the holding that the deed or memorandum of title is sufficient even though void or ineffectual as a conveyance, providing the land is adequately described.<sup>100</sup>

The payment of taxes by the claimant is not necessary under the ten-year statute, and an instruction to the contrary is prejudicial error.<sup>101</sup> Nevertheless, the payment of taxes is a circumstance which supports the adverse claim, and evidence of payment is admissible.

If the adverse claimant is not holding under a deed or other memorandum of title fixing the boundaries, then, under article 5510, the amount of land that he can acquire is confined to 160 acres including his improvements, or the number of acres actually inclosed should he have inclosed more than 160 acres. He can, under the peculiar provisions of the ten-year statute, mature a limitation title to 160 acres without showing actual occupancy of the entire 160 acres, provided his improvements are on the 160 acres. The 160-acre provision of the statute was founded upon the policy of forcing the owners of land to take possession and settle the country,<sup>102</sup> and to that extent is quite different from the general policy that the limitation statutes are intended to suppress litigation and are statutes of repose.<sup>103</sup>

Of course, if the record owner is in possession of any part of the 160 acres the adverse claimant's recovery will be limited to the part in the adverse claimant's actual possession.<sup>104</sup>

If the adverse possessor has not claimed a specific 160 acres, he can mature a limitation title to an undivided 160 acres and is entitled to have a specific 160 acres set aside to him. His adverse possession vests him with title to 160 acres where he has claimed no specific 160-acre tract, but the statute does not provide how the boundaries of his tract will be established except that his improvements must be included within such boundaries. Consequently, the adverse claimant, after he has matured a limitation title to an undivided 160 acres, cannot sell a specific 160 acres, but like all other tenants in common, he has a right to have the lands partitioned.<sup>105</sup>

Where the adverse claimant has been in possession of more than 160 acres without claiming the land under a deed or without having the land inclosed, the issue should be framed so as to inquire whether

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<sup>100</sup> *Harris v. Iglehart*, 113 S.W. 170, 171 (Tex. Civ. App. 1908).

<sup>101</sup> *Gotoskey v. Grawunder*, 158 S.W. 249, 251 (Tex. Civ. App. 1913).

<sup>102</sup> *Bracken v. Jones*, 63 Tex. 184, 186 (1885).

<sup>103</sup> *Snow v. Starr*, 75 Tex. 411, 419, 12 S.W. 673 (1889).

<sup>104</sup> *Lynch Davidson & Co. v. Beasley*, 128 S.W.2d 877 (Tex. Civ. App. 1939).

<sup>105</sup> *W. T. Carter & Bro. v. Wells*, 130 Tex. 189, 106 S.W.2d 1050 (1937); *Louisiana & Tex. Lumber Co. v. Kennedy*, 103 Tex. 297, 126 S.W. 1110 (1910).



the adverse claimant has held peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same for any period of ten consecutive years. A finding favorable to the adverse claimant would entitle him to a judgment, not for the lands actually in his possession where the quantity exceeded 160 acres, but for an undivided 160 acres in the whole.<sup>106</sup>

If the adverse claimant is claiming a specific 160 acres, he is entitled to have an issue submitted to the jury involving the 160 acres, even though he has not been cultivating, using or enjoying all of the 160 acres. The statutes permit him to claim the lands inclosed where there is less than 160 acres, with his improvements and enough additional land to make 160 acres.<sup>107</sup>

Issues involving the adverse claimant's claim to 160 acres were submitted to the jury in *Petty v. Griffin*<sup>108</sup> and may be found in the court's opinion. No objections were leveled at the issues, but there are many defects in them which would have required a reversal had objections been timely and properly made.

To mature a title to a tract under the ten-year statute it is not necessary that the tract be fenced or inclosed,<sup>109</sup> except where the tract is used for grazing or is entirely surrounded by other lands owned, claimed, or fenced by the adverse claimant, or adjoins 5,000 or more acres of land owned or claimed by the adverse claimant.<sup>110</sup> If the tract is fenced and the adverse claimant is not claiming under a deed, the peaceable and adverse possession will be construed to embrace the number of acres actually inclosed.<sup>111</sup> To the extent the lands are inclosed, the claimant holds what is termed "actual possession."<sup>112</sup> A use of a part of tract inclosed, coupled, with a claim to the whole tract, will mature a title under the ten-year statute to all of the land inclosed.<sup>113</sup>

Where the tract claimed adversely is surrounded by lands owned, claimed, or fenced by another person, the possession of the circumscribing land by the other person will not mature a title to the circumscribed tract under the ten-year statute, unless the tract is segregated and separated from the circumscribing lands by a fence, or

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<sup>106</sup> *W. T. Carter & Bro. v. Wells*, 130 Tex. 189, 106 S.W.2d 1050 (1937).

<sup>107</sup> *Houston Oil Co. v. McGrew*, 107 Tex. 220, 176 S.W.2d 45 (1950); *Lutcher v. Reed*, 237 S.W. 913 (Tex. Comm. App. 1922); *Oliver v. West Lumber Co.*, 287 S.W. 100 (Tex. Civ. App. 1926) error dism.

<sup>108</sup> 241 S.W. 252 (Tex. Civ. App. 1922) error dism.

<sup>109</sup> *McCall v. Grogan-Cochran Lumber Co.*, 143 Tex. 490, 186 S.W.2d 677 (1945).

<sup>110</sup> Arts. 5511-12.

<sup>111</sup> Art. 5510.

<sup>112</sup> *Evitts v. Roth*, 61 Tex. 81 (1884).

<sup>113</sup> *Washam v. Harrison*, 122 S.W. 52 (Tex. Civ. App. 1909).

unless at least one-tenth of it is cultivated and used for agricultural purposes or used for manufacturing purposes.<sup>114</sup> Whether the tract is circumscribed by the land of another is usually a question of law for the court, but whether the circumscribed tract is fenced, or at least one-tenth is cultivated and used for agricultural purposes, may be a question of fact for the jury, necessitating the submission of a special issue.

In *Pinchback v. Hockless*<sup>115</sup> the trial court submitted to the jury the following issue:

"Do you find from a preponderance of the evidence that the tract of land in controversy in this suit was entirely surrounded by a tract or tracts of land owned, claimed or fenced by the defendants, R. T. Pinchback and wife, from 1911 to the present time?"<sup>116</sup>

Where the tract claimed adversely is inclosed with 5,000 or more acres of land, the adverse claimant cannot mature a title under the ten-year statute unless the tract is segregated and separated by a substantial fence from the 5,000 acres, or unless at least one-tenth of the tract is cultivated and used for agricultural purposes or for manufacturing purposes, or unless there is an actual possession thereof.<sup>117</sup> Whether the tract is inclosed with 5,000 acres or more of land is generally a question of law for the court, but there may be a question of fact requiring the submission of a special issue as to whether at least one-tenth of the tract is cultivated and used for agricultural purposes, or whether the adverse claimant has been in actual possession of such tract.

Where the adverse claimant is claiming a tract of land under a deed or some written memorandum of title and there is no dispute about the adverse claimant having a deed to the land, but there is a disputed issue of fact as to whether the claimant has had peaceable and adverse possession of the land for the statutory period, the following special issue would be sufficient:

Do you find from a preponderance of the evidence that the plaintiff either in person or through a tenant or tenants, or partly in person and partly through a tenant or tenants, has held peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same for any period of ten consecutive years prior to January 1, 1952 [date of filing suit]?

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<sup>114</sup> Art. 5511.

<sup>115</sup> 137 S.W.2d 864 (Tex. Civ. App. 1940), rev'd, 138 Tex. 306, 158 S.W.2d 997 (1942).

<sup>116</sup> Id. at 866.

<sup>117</sup> Art. 5512.

If the adverse claimant has not been cultivating, using or enjoying every acre of land described in his deed, nevertheless under article 5510 his peaceable possession will be construed to be coextensive with the boundaries specified in his deed. Under those circumstances, the issue might be framed as follows:

Do you find from a preponderance of the evidence that the plaintiff . . . [etc.] has held peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same, or any part thereof, and claiming under a deed, or some written memorandum of title duly registered, for any period of ten consecutive years . . . ?

In *Cook v. Hutto*<sup>118</sup> the issue was submitted to the jury as follows:

"Do you find from a preponderance of the evidence that the plaintiffs, and those under whom they claim, either in person or through tenants, have had and held peaceable and adverse possession of the property in controversy, using, cultivating, or enjoying the same, for any period of ten consecutive years prior to the filing of this suit on September 2, 1939?"<sup>119</sup>

In *Pinchback v Hockless*<sup>120</sup> the court submitted the issue as follows:

"Do you find from the preponderance of the evidence that the defendants, R. T. Pinchback and wife, either in person or through a tenant or tenants, or those under whom they claim, either in person or through a tenant or tenants, have held peaceable and adverse possession of the land in controversy, cultivating, using and enjoying the same, for any period of ten consecutive years, after December 12, 1901, and before December 12, 1921?"<sup>121</sup>

The issue is erroneous in that the conjunctive *and* instead of the disjunctive *or* is used in connection with "cultivating, using *and* enjoying" the same.

In the *Pinchback* case the adverse claimant claimed that he and those under whom he claimed had been in peaceable and adverse possession of the land for forty-seven years. The court, in submitting the ten-year statute, submitted three issues, each inquiring about separate and distinct periods of time during the forty-seven-year period. The Supreme Court held that the adverse claimant was entitled to have the question of his adverse claim submitted in a single issue and it was erroneous to break the issues down to three periods.

<sup>118</sup> 151 S.W.2d 642, 644 (Tex. Civ. App. 1941), rev'd on other grounds, 139 Tex. 571, 164 S.W.2d 513 (1942).

<sup>119</sup> Id. at 644.

<sup>120</sup> 137 S.W.2d 864 (Tex. Civ. App. 1940), rev'd, 138 Tex. 306, 158 S.W.2d 997 (1942).

<sup>121</sup> Id. at 866.

The Court also held that one of the issues submitted was evidentiary and not an ultimate controlling issue and was upon the weight of the evidence. The issue, in effect, was whether the adverse claimant, who was the defendant, had repudiated plaintiff's title. It was pointed out that evidence of repudiation of the title was only part of the evidence to be considered by the jury in determining the ultimate issue of whether the defendant had matured his title under the statute during the long period of occupancy.

If the adverse claimant has not been claiming the land under a deed or some written memorandum of title duly registered, and has not been cultivating all of the land, but only a part, and there is evidence showing that the land has been inclosed, the following issue would suffice:

Do you find from a preponderance of the evidence that the plaintiff . . . [etc.] has held peaceable and adverse possession of the lands in controversy, under an inclosure, cultivating, using or enjoying the same, or any part thereof, for any period of ten consecutive years . . . [etc.]?

The court should then instruct the jury on what constitutes an inclosure. The following instruction might suffice in the ordinary case:

In connection with the term "under an inclosure" you are instructed that in order for lands to be held under an inclosure the lands must be inclosed by fences, or partly by fences and partly by natural barriers, such as rivers, mountains or cliffs, which are sufficient to prevent cattle from escaping from or entering onto the lands, and are sufficient to give notice to defendant [or plaintiff] of the plaintiff's [or defendant's] hostile claim to the lands, if you find and believe he was making a hostile claim to the land. To constitute an inclosure the fences must have been reasonably maintained and any temporary breaks or gaps must have been repaired within a reasonable length of time.

In *Halsey v. Humble Oil & Refining Company*<sup>122</sup> the court submitted an issue to the jury involving the ten-year statute. The adverse claimant was claiming under a deed which fixed the boundaries of the land. There was a disputed issue of fact as to whether the adverse claimant had been in possession of the land for the statutory period. The lands were used by the adverse claimant for pasturing stock and at times the fences were down and at other times the lands were covered by overflow from the Trinity River. The court instructed the jury in connection with the special issue on the ten-year statute that if they should find that during certain periods there were

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<sup>122</sup> 66 S.W.2d 1082 (Tex. Civ. App. 1933) error dismissed.

gaps or breaks in the fence, but that the gaps or breaks were only temporary and were repaired in a reasonable length of time, then such temporary gaps or breaks in the fence would not prevent the use and enjoyment which the defendants had made of the lands from being regarded as continuous and uninterrupted, or from being regarded as actual and physical appropriation of the land. The court further charged the jury that if they found that the defendants were prevented from pasturing cattle by overflow from the Trinity River and the overflow hid the fences from view, and they further found that such periods of time were not unreasonable under all the surrounding facts and circumstances, that the fact that the overflow at times prevented the pasturing of cattle and hid the fences would not prevent the use and enjoyment which defendants, and those under whom they hold, made of the land from being regarded as continuous and uninterrupted. The court also instructed the jury on what constituted a substantial inclosure and what constituted peaceable and adverse possession. The instructions are very long and constitute a substantially correct statement of the law on adverse possession. The court held the instructions were proper and were not upon the weight of the evidence and did not give undue emphasis to the evidence of the adverse claimant.

In *Broughton v. Humble Oil & Refining Company*<sup>123</sup> the court submitted to the jury the following special issue:

"Do you find from a preponderance of the evidence that the plaintiff, Herbert Broughton, had been in peaceable, adverse, and continuous possession of the land in controversy, using the same as a pasture for grazing purposes for any period of ten consecutive years or more prior to the 16th day of December, 1934?"<sup>124</sup>

In connection with the issue, the court further charged the jury:

"You are further instructed that in order to find that the plaintiff used the land in controversy as a pasture for grazing purposes, as that phrase is used in Special Issue No. 1, you must find and believe from a preponderance of the evidence that the plaintiff had the land in controversy, either alone or with other lands, completely enclosed for any continuous period of ten consecutive years before the 16th day of December, 1934, with a substantial fence capable of retaining and excluding cattle of ordinary disposition, and that he pastured cattle within said enclosure, if any, for said period.

"You are further instructed that if you believe from a preponderance of the evidence that Dickinson Bayou, during the period inquired about, constituted a natural barrier to the passage of cattle, then it

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<sup>123</sup> 105 S.W.2d 480 (Tex. Civ. App. 1937) error ref.

<sup>124</sup> Id. at 482.

would not be necessary that plaintiff should fence the land actually bordering on said bayou in order to enclose same completely.<sup>125</sup>

Objections were made to the instructions upon the ground that they constituted a comment upon the weight of the evidence, were confusing and misleading, and no definition was given of the term "natural barrier," but the objections were overruled, and on appeal the court held that the objections were without merit.

Special issues involving the ten-year statute must be submitted in such form as will result in a finding by the jury upon the disputed issues of fact. There are many opinions of the appellate courts which contain verbatim the issues submitted to the jury.<sup>126</sup> The issues found in these opinions may be helpful in submitting a case to the jury, but they should be carefully analyzed to ascertain whether they are sufficient when considered in connection with the particular facts in the case.

An issue is not multifarious because there is embodied in a single issue an inquiry as to whether the adverse claimant has held peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same, and holding under a written memorandum of title. All of the elements of the statute compose one ultimate fact issue and should be embodied in one issue.<sup>127</sup>

#### *E. The Twenty-five-Year Statute*

The twenty-five-year statute of limitation was not enacted until 1919 and has been rarely construed. The adverse claimant in order to mature a title under the twenty-five-year statute must have had peaceable and adverse possession of the land for a period of twenty-five-years, under a claim of right, in good faith, under a deed or deeds, or instruments duly registered purporting to convey the land. An issue involving the twenty-five-year statute might be submitted to the jury in the following language:

Do you find from a preponderance of the evidence that the plaintiff and those in privy of estate with him, either in person or through a

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<sup>125</sup> *Id.* at 485.

<sup>126</sup> *Pinchback v. Hockless*, 138 Tex. 306, 158 S.W.2d 997 (1942), reversing 137 S.W.2d 864 (Tex. Civ. App. 1940); *Viduarri v. Bruni*, 179 S.W.2d 818 (Tex. Civ. App. 1944) error ref. w.o.m.; *Allison v. California Petroleum Co.*, 158 S.W.2d 597 (Tex. Civ. App. 1941) error ref. w.o.m.; *Cook v. Hutto*, 151 S.W.2d 642 (Tex. Civ. App. 1941), rev'd, 139 Tex. 571, 164 S.W.2d 513 (1942); *Eichlitz v. Allen*, 131 S.W.2d 43 (Tex. Civ. App. 1939) error dism., judg. cor.; *Broughton v. Humble Oil & Ref. Co.*, 105 S.W.2d 480 (Tex. Civ. App. 1937) error ref.; *Overton Ref. Co. v. Harmon*, 81 S.W.2d 207 (Tex. Civ. App. 1935), rev'd, 130 Tex. 365, 109 S.W.2d 457 (1937), aff'd on rehearing, 130 Tex. 365, 110 S.W.2d 555 (1937); *Houston Oil Co. v. Stepney*, 187 S.W. 1078 (Tex. Civ. App. 1921) error ref.

<sup>127</sup> *Davis v. Dowlen*, 136 S.W.2d 900 (Tex. Civ. App. 1939) error dism., judg. cor.

tenant or tenants, or partly in person or partly through a tenant or tenants, have held peaceable and adverse possession of the lands in controversy, or any part thereof, for any period of twenty five consecutive years prior to January 1, 1952 under a claim of right, in good faith, and under a deed or deeds, or other instrument or instruments duly registered purporting to convey such lands?

The terms "privity of estate," "peaceable possession," "adverse possession," and "duly registered" should be defined,<sup>128</sup> and the following instructions in the language of the statute given:

You are instructed that the term "instrument or instruments purporting to convey the lands in controversy" shall mean any instrument in the form of a deed, or any instrument which contains language showing an intention to convey the lands, even though such instrument, for want of proper execution, or other cause, is void on its face or in fact.<sup>129</sup>

It would appear that if the uncontradicted evidence showed that there was of record a chain of conveyances into the adverse claimant and those in privity of estate with him, the issue could be submitted by eliminating the clause "under a deed or deeds or other instrument or instruments duly registered purporting to convey such lands."

Quite frequently article 5519a is referred to as a twenty-five-year statute of limitation. It is not truly a limitation statute; rather, it is a statute creating prima facie evidence of title. The article provides that if the evidence shows that the apparent record title owner has not exercised dominion over the land or has not paid taxes thereon one or more years during a period of twenty-five years, and that during such period the opposing party has openly exercised dominion over and asserted claim to the land and paid taxes thereon annually before becoming delinquent, such fact shall constitute prima facie proof that the title to the land has passed to the person exercising dominion over same. The reported cases where an issue was submitted to the jury under article 5519a are *West v. Hapgood*<sup>130</sup> and *Whelan v. Henderson*.<sup>131</sup> In the opinion in the *Hapgood* case the court stated that the jury made the following finding:

No 12: That the parties claiming under W. B. Brush have not exercised dominion over the lands or have not paid taxes thereon one or more years during the period of 25 years next preceding May 13, 1941, and that the defendants claiming under Worsham have openly exercised

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<sup>128</sup> See definitions of these terms *supra*.

<sup>129</sup> An issue in substantially this form was given in *West v. Hapgood*, 169 S.W.2d 204 (Tex. Civ. App. 1943), *aff'd*, 141 Tex. 576, 174 S.W.2d 963 (1943).

<sup>130</sup> *Ibid*.

<sup>131</sup> 137 S.W.2d 150 (Tex. Civ. App. 1939) error *dism.*, *judg. cor.*

dominion over and asserted claim to said lands and have paid taxes thereon annually before becoming delinquent, for as many as 25 years during such period.<sup>132</sup>

If there was no evidence showing that the defendant's predecessor in title had conveyed the lands in controversy to the plaintiff's predecessor in title and there was a disputed issue of fact on the essential elements of article 5519a, an issue should be submitted to the jury, it might be submitted in the above language, or as follows:

Do you find from a preponderance of the evidence that there was a period of 25 consecutive years prior to January 1, 1952, during which defendant neither exercised dominion over the lands in controversy, nor paid taxes thereon for one or more years, and during which plaintiff openly exercised dominion over and asserted claim to such lands, paying taxes thereon?

"Paying taxes thereon" should be defined, and such a definition has been given herein.

The issue submitted on the twenty-five-year statute in the *Whelan* case is not contained in the opinion, but the court stated that the jury found that plaintiff had exercised dominion over the land from August 30, 1912, to August 30, 1937. An exception was taken to the issue because the court did not define "dominion." The Texarkana court held that the exception was good and that the term should have been defined. It said that it might have been defined as follows: "The exercise of dominion over land is such open acts and conduct relative thereto as evidence the claim of the right of absolute possession, use and ownership thereof." <sup>133</sup>

The court also submitted to the jury an issue as to whether the deceased or his administratrix had executed and delivered a deed to R. E. Rowell. The issue was followed by the following instruction:

"In connection with this issue, you are instructed that you may consider any facts or circumstances in evidence before you which, in your judgment, you deem to be worthy of consideration or weight to show that such deed was executed and has been lost." <sup>134</sup>

The court held that the instruction was erroneous and reversible error. It pointed out that the issue submitted the question of the execution and delivery of a deed alone, and not whether a deed had been executed and lost. It held that the instruction enlarged on the scope of the issue, was a comment on the weight of the evidence, and

<sup>132</sup> 169 S.W.2d 204, 208 (Tex. Civ. App. 1943).

<sup>133</sup> 137 S.W.2d 150, 154 (Tex. Civ. App. 1939) error dism., judg. cor.

<sup>134</sup> Id. at 154.



was a general charge. It disclaimed any intention to hold it was improper to give the jury a charge as to circumstantial evidence.

### III. BOUNDARIES

Some of the most difficult and complex issues to be submitted to a jury in a land suit are issues of boundary. In the ordinary case involving boundaries one party is contending for one line and the other party for a different line. It has been said that what are boundaries is a matter of law; where they are located is a matter of fact.<sup>135</sup>

Boundary cases can be divided into two classes. There is the case involving a survey made on the ground with the lines and corners marked by the original surveyor. Then there is the case involving an office survey with none of the lines or corners marked on the ground by the original surveyor.

Where the survey was made on the ground the primary object is to "follow the footsteps of the surveyor."<sup>136</sup> Whether his footsteps have been found, or where they are located, or whether they have been followed are issues which must be submitted to the jury. The facts may be sharply disputed as to whether an object found fifty years after the survey was made is the one marked or identified by the original surveyor and called for in his field notes. If none of the original objects can be found, then the jury must ascertain in response to special issues whether the line contended for by the plaintiff or the line contended for by the defendant coincides with the line marked by the surveyor and called for in his field notes.

Where the survey was made in an office and the field notes call for adjoiners with senior surveys which in turn were surveyed on the ground, the jury may be called upon to decide whether the calls in the junior survey for adjoiners with the senior survey were made through error or conjecture; or it may have to find where the lines and corners of the senior survey are located on the ground.

If all of the objects called for in the field notes have disappeared, the jury will not be able to determine which of two lines coincides with the footsteps of the original surveyor, unless the lines have been re-monumented on a resurvey and properly described in the pleadings and by the surveyor in his testimony. The careful land lawyer will throughout the trial of a boundary suit emphasize the location and descriptions of monuments established on the resurvey so that the

<sup>135</sup> *Bolton v. Lann*, 16 Tex. 96 (1856).

<sup>136</sup> *Thatcher v. Matthews*, 101 Tex. 122, 105 S.W. 317 (1907); *Bolton v. Lann*, 16 Tex. 96 (1856); *Humble Oil & Ref. Co. v. State*, 162 S.W.2d 119 (Tex. Civ. App. 1942) error ref.

court can submit to the jury an issue as to whether the line as re-monumented coincides with the line called for in the original field notes.

It is error to submit to the jury an issue as to whether the line of a survey is located as contended for by the plaintiff or by the defendant. The verdict of the jury would not furnish the means for locating the disputed boundary line on the ground. The issue would not identify the location of the line, nor could a judgment be written upon the verdict which would enable the sheriff to put the proper party in possession.

It was said in *Southern Pine Lumber Company v. Whiteman*<sup>137</sup> in regard to an issue inquiring whether the line was located as contended for by the plaintiff, that:

Since a judgment is required, among other things, to conform to "the verdict, if nay" . . . , it seems clear that the court should not render judgment on a verdict which does not determine the disputed issues in the case . . . .

The verdict of the jury in this case did not itself locate, nor furnish the means of locating, the disputed boundary line on the ground . . . .

A judgment awarding a plaintiff recovery of a tract of land by the same description as his title papers manifestly could have no effect in settling a dispute as to the actual location on the ground of one or more of the boundary lines. Hence, it is considered to be a settled proposition that in a trespass to try title suit wherein the only controversy concerns the location on the ground of a boundary line between plaintiff's land and the land of another adjoining his, it is necessary to describe the disputed line by reference to objects concerning which there can be no controversy and the verdict of the jury must evince their finding with reference to such objects.<sup>138</sup>

The framing of special issues in a boundary suit may often be greatly simplified by reference to a map or plat either properly introduced in evidence or included as a part of the court's charge. Issues submitted in this form have been approved by our courts.<sup>139</sup>

In *Humble Oil & Refining Company v. Owings*,<sup>140</sup> Justice Speer of the Fort Worth court said that the submission of a boundary case by use of a plat was obviously fraught with dangers. In that case, all of the special issues are contained in the opinion. One of the issues was whether the east boundary line of the survey as originally

<sup>137</sup> 104 S.W.2d 635 (Tex. Civ. App. 1937) error dism.

<sup>138</sup> Id. at 637-38.

<sup>139</sup> *Humble Oil & Ref. Co. v. Owings*, 128 S.W.2d 67 (Tex. Civ. App. 1939); *Mid-Kansas Oil and Gas Co. v. Burton*, 87 S.W.2d 338 (Tex. Civ. App. 1935) error granted on other grounds and dism. by agreement; *Still v. Barton*, 76 S.W.2d 783 (Tex. Civ. App. 1934) error dism.

<sup>140</sup> 128 S.W.2d 67 (Tex. Civ. App. 1939).

run was located at the place shown by the line CD by plaintiff's surveyor on Exhibit No. 114. Another issue was whether the southwest corner of the survey was located at Point G on plaintiff's Exhibit No. 114. The court held that the issues were not subject to the objection that they were on the weight of the evidence, or that they gave undue prominence to the testimony of surveyor Hackney. It was pointed out that if the jury had been asked in a proper question to locate the line independently of any plat, they could not have done so. However, the case was reversed and remanded because in another special issue the burden was erroneously placed upon the defendant and the issue had been conditionally submitted.

It is very easy to make an error in submitting an issue to the jury based upon a map. For instance, in *Maxwell v. Walters Petroleum Corporation*<sup>141</sup> the court in its charge instructed the jury that Line No. 1 as used in the charge purported to represent the true and correct line of the survey as the plaintiff claimed it was located in his pleading and on the plats introduced by him, and Line No. 2 as used in the charge purported to represent the true and correct line of the survey as defendant claimed it was located in his pleadings and on the plats introduced by him. The instructions were then followed by an issue inquiring whether Line No. 1 or Line No. 2 was the true and correct boundary line of the survey. Objections were made to the charge and on appeal the case was reversed because of the erroneous submission. The court held that the charge was misleading and confusing, that the numerical designations were wrong, and the pleadings of the parties were improperly referred to.

The burden of proof is on the plaintiff to establish not only the boundaries which are in dispute, but also his title to the lands embraced in the boundaries. Unless he has established his title as a matter of law, issues should also be submitted on title; otherwise, the issues of boundary would be of no avail.<sup>142</sup>

The proper placing of the burden of proof in framing special issues on boundaries should be considered in connection with the right of the defendant to an affirmative submission of his theories of defense. If the plaintiff can show that he is in possession of the land described in his petition, the rule is that the burden is on the defendant to show that the lands are not owned by plaintiff because they are within the boundaries of the lands owned by defendant. The rule is founded upon the proposition that in a trespass to try title suit where the plaintiff shows priority of possession and no title

<sup>141</sup> 120 S.W.2d 813 (Tex. Civ. App. 1938).

<sup>142</sup> *Greenlee v. Taylor*, 79 Tex. 149, 14 S.W. 1056 (1890).

is found in the defendant, plaintiff, by virtue of such possession, is entitled to judgment.<sup>143</sup>

If the case does not turn upon priority of possession but the issues are solely issues of boundary, a more difficult question arises. The burden of proof is on the plaintiff to show the proper location of the lines. The defendant may deny plaintiff's location and attempt to show a location entirely different. Would the defendant in such event be entitled to have his defense affirmatively submitted, and, if so, upon whom would the burden rest? There are three cases which are in point.

In *Jones-O'Brien v. Loyd*<sup>144</sup> the court held the defendant was entitled to have submitted his theory of defense, because if the lines were located as claimed by him, the plaintiff would not be entitled to recover. However, the trial court placed the burden on the defendant to prove that the lines were located as he contended them to be. Judge Funderburk for the Eastland Court held the burden had been improperly placed. He said:

The burden of proof was thus placed upon the defendants to show that the corners were as contended by them. The law imposed upon the plaintiffs the burden of proof to show by a preponderance of the evidence that said corners were as contended by plaintiffs. If the corners were located as plaintiffs sought to show, then they were not located as defendants contended, and vice versa. Incidentally, therefore, the issues in the form submitted imposed upon the defendants, as a condition upon which they might obtain a favorable verdict, the burden to prove by a preponderance of the evidence that the corners were not as contended by the plaintiffs. Let us suppose the jury had found the evidence of equal weight supporting the contentions of the plaintiffs and the defendants. How would they have answered the issues so that the verdict would have been based upon a preponderance of the evidence? It is clear that no such answers could be made.<sup>145</sup>

After saying that the defendants' evidence tending to establish a different location was in rebuttal to plaintiffs' evidence, he concluded:

... it has been repeatedly held upon similar situations that where the evidence tends to establish a fact or facts constituting a complete defense, the defendant in a case submitted on special issues has the right to have submitted an issue or issues calling for a finding of such fact or facts. Such issues are required to be so stated as to place the burden of proof upon the plaintiffs to establish the negative.<sup>146</sup>

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<sup>143</sup> 41A Tex. Jur. Trespass to Try Title §§ 26-27,33,35-36 (1953).

<sup>144</sup> 106 S.W.2d 1069 (Tex. Civ. App. 1937) error dismissed.

<sup>145</sup> *Id.* at 1071.

<sup>146</sup> *Ibid.*

In *Humble Oil & Refining Company v. Owings*<sup>147</sup> the court held that the defendant was entitled to have submitted an issue on the location of the line, as he contended it was located, even though the line would be situated differently from where plaintiff sought to locate it. The court said that an "... answer of an issue favorable to plaintiff will not obviate the necessity of requiring an answer to the issue pertaining to defendant's rights . . . . This is true even if the answers to the defensive issues result in contradiction to those for plaintiff."<sup>148</sup>

It concluded that the burden was on plaintiff to show that the line was not located where defendant contended it was located and that the burden had been improperly placed on the defendant.

A similar decision was rendered in *Snyder v. Magnolia Petroleum Company*.<sup>149</sup> The court compared the defensive issue of a different location for the line to the defensive issue of unavoidable accident.

Judge Speer in the *Owings* case, in holding that the defendant was entitled to have submitted a special issue inquiring whether the line was located as he claimed it was, with the burden on the plaintiff to prove the negative, cited *Wright v. Traders & General Insurance Company*,<sup>150</sup> a workman's compensation suit. The court in that case held, in effect, that if the defensive issue is merely the opposite of the plaintiff's issue, it need not be submitted, but that if the defensive issue is the converse of an issue submitted for the plaintiff, it must be submitted at the defendant's request.<sup>151</sup> However, the obscure distinction between converse issues and opposite issues, as they may relate to boundary suits, has not been discussed in the opinions.

The burden is quite heavy on the plaintiff when he must show where the line is and is not located. The *Owings* case never reached the Supreme Court, and writs were dismissed in the *Jones-O'Brien* and *Snyder* cases. No case has been found where the Supreme Court has followed the rule announced in these three cases.

The authorities are not harmonious as to whether the court should give an instruction to the jury on the priority of the calls in the field notes. In the *Owings* case the court instructed the jury that if there was a conflict in a call between its course, distance, or natural or artificial object, the jury must give controlling effect to natural objects, artificial objects, course, and distance in the order named.

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<sup>147</sup> 128 S.W.2d 67 (Tex. Civ. App. 1939).

<sup>148</sup> Id. at 73.

<sup>149</sup> 107 S.W.2d 603 (Tex. Civ. App. 1937) error dismissed.

<sup>150</sup> 132 Tex. 172, 123 S.W.2d 314 (1939).

<sup>151</sup> See *Stone v. Traders & Gen. Ins. Co.*, 154 Tex. 21, 273 S.W.2d 59 (1954).

On appeal it was held the instruction was not a general charge, the court saying:

The court included that paragraph in his charge, evidently upon the theory that it was explanatory and necessary to enable the jury to pass upon and render a verdict upon the issues submitted. Article 2189, R.C.S. provides, among other things, that: 'In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues.' Strictly speaking, the charge complained of does not explain or give a definition of any legal term used in the charge. But we believe the purpose of the statute was to facilitate and aid the jury in understanding the issues submitted, so as to enable them to answer the questions intelligently.<sup>152</sup>

A different conclusion was reached in *Swearingen v. Brown*.<sup>153</sup> The court there held that a charge on the comparative dignity of calls was on the weight of the testimony and would have been more confusing than helpful.

The issues should be framed so that it will not be necessary to give an instruction on the comparative dignity of calls. The rule of comparative dignity is a rule of evidence, but it will not be arbitrarily applied to bring about a result obviously at variance with the intention of the original surveyor.<sup>154</sup>

The case of *State v. Franco-American Securities*<sup>155</sup> was a hard-fought, well-tried boundary suit. Fifteen special issues were submitted to the jury and may be found in the opinion. Various issues were submitted on the location of lines, identification of objects, and whether calls for adjoiners were inserted in the field notes through mistake. The land lawyer will profit by studying the issues.<sup>156</sup>

Too much emphasis cannot be placed upon the importance of monumenting and identifying with certainty the line which a party contends coincides with the original marked line and the original monuments which have disappeared with the passage of time. The

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<sup>152</sup> 128 S.W.2d 67, 75-76 (Tex. Civ. App. 1939).

<sup>153</sup> 195 S.W.2d 724 (Tex. Civ. App. 1946) error ref. n.r.e.

<sup>154</sup> *Garcia v. Garza*, 161 S.W.2d 297 (Tex. Civ. App. 1942); see also *Lemm v. Miller*, 245 S.W. 90 (Tex. Civ. App. 1921), rev'd on other grounds, 276 S.W. 211 (Tex. Comm. App. 1925); *W. T. Carter & Bro. v. Collins*, 192 S.W. 316 (Tex. Civ. App. 1916) error ref.

<sup>155</sup> 172 S.W.2d 731 (Tex. Civ. App. 1943) error ref. w.o.m.

<sup>156</sup> Other issues may be found in *Wyman v. Harris*, 222 S.W.2d 297 (Tex. Civ. App. 1949) error ref. n.r.e.; *Davis v. Woolverton*, 184 S.W.2d 659 (Tex. Civ. App. 1944) error ref. w.o.m.; *Humble Oil & Ref. Co. v. Owings*, 128 S.W.2d 67 (Tex. Civ. App. 1939); *Snyder v. Magnolia Petroleum Co.*, 107 S.W.2d 603 (Tex. Civ. App. 1937) error dism.; *Cockrell v. Work*, 94 S.W.2d 784 (Tex. Civ. App. 1936) error dism.; *Mid-Kansas Oil & Gas Co. v. Burton*, 87 S.W.2d 338 (Tex. Civ. App. 1935) error granted and dism. by agreement; *Redden v. Pure Oil Co.*, 86 S.W.2d 874 (Tex. Civ. App. 1935).

issue submitted to the jury must identify a line on the ground so that a proper judgment can be rendered on the verdict. The issue will not be as difficult to submit if the inquiry is directed to objects upon the ground.

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